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IN THE
COURT OF APPEALS OF INDIANA

JAMES L. CHESTNUT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 14A05-0510-CR-587
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Robert L. Arthur, Judge
Cause No. 14C01-0401-FA-002

September 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

James L. Chestnut appeals his sentence for child molesting as a class A felony.[1] Chestnut raises two issues, which we revise and restate as:

I. Whether his sentence violates Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied;

II. Whether the trial court abused its discretion by failing to consider mitigating factors; and

III. Whether Chestnut's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On January 30, 2004, the State charged Chestnut with: (1) Count I, child molesting as a class A felony for engaging in sexual intercourse with Jane Doe[2] on or about July 5, 2002, when Jane was under the age of fourteen years; (2) Count II, child molesting as a class A felony for engaging in sexual intercourse with Jane between July 5, 2002, and July 4, 2003, when Jane was under the age of fourteen years; (3) Count III, child molesting as a class A felony for engaging in deviate sexual conduct with Jane between July 5, 2002, and July 4, 2003, when Jane was under the age of fourteen years; (4) Count IV, sexual misconduct with a minor as a class B felony[3] for engaging in sexual intercourse with Jane between July 5, 2003, and January 4, 2004, when Jane was under the age of sixteen years but at least fourteen years of age; (5) Count

[1] Ind. Code § 35-42-4-3(a) (2004).

[2] The probable cause affidavit and charging informations identified the victim as Jane Doe, and only her first name, M., was used in the guilty plea hearing. We will refer to her as Jane.

[3] Ind. Code § 35-42-4-9(a) (2004).

V, sexual misconduct with a minor as a class B felony for engaging in sexual intercourse with Jane on or about January 4, 2004, when Jane was under the age of sixteen years but at least fourteen years of age; (6) Count VI, sexual misconduct with a minor as a class B felony for engaging in deviate sexual conduct with Jane between July 5, 2003, and January 4, 2004, when Jane was under the age of sixteen years but at least fourteen years of age; (7) Count VII, child molesting as a class C felony[4] for fondling or touching Jane on or about July 5, 2002, when Jane was under the age of fourteen years; (8) Count VIII, child molesting as a class C felony for fondling or touching Jane between July 5, 2002, and July 4, 2003, when Jane was under the age of fourteen years; (9) Count IX, sexual misconduct with a minor as a class C felony[5] for fondling or touching Jane between July 5, 2003, and January 4, 2004, when Jane was under the age of sixteen years but at least fourteen years of age; and (10) Count X, sexual misconduct with a minor as a class C felony for fondling or touching Jane on or about January 4, 2004, when Jane was under the age of sixteen years but at least fourteen years of age.

On May 3, 2005, sixty-two-year-old Chestnut pleaded guilty to Count II, child molesting as a class A felony for engaging in sexual intercourse with Jane between July 5, 2002, and July 4, 2003, when Jane was under the age of fourteen years. Although there was no formal plea agreement, the State agreed to dismiss the remaining nine

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[4] Ind. Code § 35-42-4-3(b) (2004).

[5] Ind. Code § 35-42-4-9(b) (2004).

charges if the guilty plea "[went] through." Transcript at 9. During the guilty plea hearing, Chestnut's counsel asked him "it was your decision that you did not want to go to trial on this case. Isn't that correct?" and Chestnut responded, "Yes." Id. at 14. Chestnut's counsel then stated, "And you did not want to put your granddaughter through that," and Chestnut responded, "Right." Id. Chestnut admitted that, shortly after Jane's thirteenth birthday, he inserted his penis into her vagina. The trial court accepted Chestnut's guilty plea, and the State dismissed the remaining charges.

At the sentencing hearing, Chestnut testified that he pleaded guilty because "[he] did not want her here." Id. at 27. Chestnut also testified that he only completed the seventh grade because he had a hard time "keep[ing] up" in school, that he cannot multiply or subtract, that he cannot understand what he reads, that his father was abusive, and that he has health problems. Id. at 29. Due to his health problems, Chestnut denied remembering many of the events with which he was charged. Chestnut's presentence investigation report indicates that he was charged with operating a vehicle without proof of financial responsibility as a class C misdemeanor in 1993, but the charge was dismissed. He was also charged with conspiracy to commit theft and assisting a criminal in 1985, but the disposition of these charges is unknown.

The trial court found one aggravating factor, the fact that the victim was Chestnut's granddaughter, and one mitigating factor, Chestnut's lack of a criminal record. The trial court sentenced Chestnut to the "advisory sentence" of thirty years. Id. at 41.

I.

The first issue is whether Chestnut's sentence violates Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g denied. On June 24, 2004, the United States Supreme Court decided Blakely, which held that facts supporting an enhanced sentence must be admitted by the defendant or found by a jury. Blakely, 542 U.S. at 303-304, 124 S. Ct. at 2537; Cotto v. State, 829 N.E.2d 520, 527 n.2 (Ind. 2005). In Smylie v. State, the Indiana Supreme Court held that Blakely was applicable to Indiana's sentencing scheme and required that "the sort of facts envisioned by Blakely as necessitating a jury finding must be found by a jury under Indiana's existing sentencing laws." Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005). The Indiana Supreme Court recently noted that "Blakely and the later case United States v. Booker[, 543 U.S. 220, 125 S. Ct. 738, 756 (2005),] indicate that there are at least four ways that meet the procedural requirements of the Sixth Amendment in which such facts can be found and used by a court in enhancing a sentence." Mask v. State, 829 N.E.2d 932, 936 (Ind. 2005).

> [A]n aggravating circumstance is proper for Blakely purposes when it is: 1) a fact of prior conviction; 2) found by a jury beyond a reasonable doubt; 3) admitted to by a defendant; or 4) stipulated to by the defendant, or found by a judge after the defendant consents to judicial fact-finding, during the course of a guilty plea in which the defendant has waived his Apprendi rights.

Id. at 936-937 (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

Chestnut argues that the trial court erred by using the fact that the victim was his granddaughter as an aggravating factor under Blakely. Before addressing Chestnut's argument, we note that, although Chestnut was charged on January 30, 2004, he was

sentenced on September 20, 2005. As a result of Blakely and Smylie, Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code §§ 35-38-1-7.1, 35-50-2-1.3. Chestnut committed his offenses prior to the effective date of the amended statutes but was sentenced after the effective date.

On appeal, Chestnut argues that the presumptive sentencing scheme in effect prior to April 25, 2005, should be applied and, thus, that we should apply Blakely. The State argues that the trial court properly used the new advisory sentencing scheme because the change in the sentencing statute was procedural rather than substantive and can be applied retroactively. Chestnut counters that the retroactive application of the advisory sentencing scheme would violate "constitutional mandates prohibiting *ex post facto* laws." Reply Brief at 3. This panel has addressed this issue in Walsman v. State, No. 69A04-0512-CR-701 (Ind. Ct. App. 2006), holding that the use of the new advisory sentencing scheme violated the prohibition against ex post facto laws where no valid aggravators existed to warrant an enhanced sentence.

Here, even applying the presumptive sentencing scheme in effect prior to April 25, 2005, as Chestnut requests, we conclude that the trial court's use of the fact that the victim was Chestnut's granddaughter does not implicate Blakely. As noted above, an aggravating circumstance is proper for Blakely purposes if it is admitted to by a defendant. Mask, 829 N.E.2d at 936-937. During the guilty plea hearing, Chestnut's counsel asked him "it was your decision that you did not want to go to trial on this case.

Isn't that correct?" and Chestnut responded, "Yes." Transcript at 14. Chestnut's counsel then stated, "And you did not want to put your granddaughter through that," and Chestnut responded, "Right." Id. This statement was sufficient to constitute an admission that the victim was Chestnut's granddaughter.[6] See, e.g., Trusley, 829 N.E.2d at 925-926 (holding that a statement by counsel was sufficient to constitute an admission by Trusley that the victim was under twelve at the time of his death). Thus, the trial court properly considered the fact that the victim was Chestnut's granddaughter as an aggravator.

II.

The next issue is whether the trial court abused its discretion by failing to consider Chestnut's guilty plea as a mitigating factor. Even applying the presumptive sentencing scheme in effect prior to April 25, 2005, as Chestnut requests, we conclude that the trial court did not abuse its discretion by not considering Chestnut's guilty plea as a mitigating factor.

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the

[6] The State also argues that Chestnut's failure to challenge the presentence investigation report, which identified the victim as his granddaughter, is an admission. However, the Indiana Supreme Court has held that "using a defendant's failure to object to a presentence report to establish an admission to the accuracy of the report implicates the defendant's Fifth Amendment right against self-incrimination." Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005). Consequently, we do not consider Chestnut's failure to challenge the PSI as an admission that the victim was his granddaughter.

same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001). However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

The Indiana Supreme Court has recognized that "[a] guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial." Francis v. State, 817 N.E.2d 235, 237-238 (Ind. 2004). "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return." Id. at 237-238.

Here, Chestnut did receive a substantial benefit in return for his guilty plea. Although Chestnut faced ten charges, including thee counts of child molesting as a class A felony, three counts of sexual misconduct with a minor as a class B felony, two counts of sexual misconduct with a minor as a class C felony, and two counts of child molesting as a class C felony, for his repeated sexual abuse of his granddaughter between July 5, 2002, and January 4, 2004, Chestnut pleaded guilty to only one count of child molesting

as a class A felony. Rather than face a possible sentence of 242 years, Chestnut faced only a possible sentence of fifty years. Ind. Code § 35-50-2-4; 35-50-2-5; 35-50-2-6. Chestnut has already received a significant benefit from his guilty plea, and we conclude that the trial court did not abuse its discretion. See, e.g., Sensback v. State, 720 N.E.2d 1160, 1165, 1165 n.4 (Ind. 1999) (holding that the trial court did not abuse its discretion where the defendant received a significant benefit from her guilty plea).

III.

The last issue is whether Chestnut's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Chestnut argues that the trial court did not give enough weight to his lack of criminal history and acceptance of responsibility and that we should revise his sentence to "a mitigated minimum sentence." Appellant's Brief at 10.

Our review of the nature of the offense reveals that sixty-two-year-old Chestnut pleaded guilty to having sexual intercourse with his granddaughter shortly after her thirteenth birthday. Our review of the character of the offender reveals that Chestnut does not have a verifiable criminal history. Chestnut has a seventh grade education, limited math and reading comprehension skills, and health problems. Although he pleaded guilty to spare his granddaughter from testifying and admitted to having sexual

intercourse with her, his remorse is brought into question because he also claimed in the presentence investigation report and at the sentencing hearing that he did not "remember doing it because in 1995 he heard and [sic] explosion in his head which he thinks was a ruptured blood vessel." Appellant's Appendix at 39.

The trial court considered Chestnut's lack of criminal history in imposing the advisory sentence. After due consideration of the trial court's decision, we find nothing in the above to make Chestnut's thirty-year sentence for child molesting as a class A felony inappropriate. Francis v. State, 817 N.E.2d 235, 239 (Ind. 2004) (holding that the presumptive sentence of 30 years for child molesting as a class A felony was the appropriate sentence in light of the nature of the offense and the character of the offender).

For the foregoing reasons, we affirm Chestnut's sentence for child molesting as a class A felony.

Affirmed.

NAJAM, J. and ROBB, J. concur